

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

DEC. 17, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The Coca-Cola Company
v.
Country Club Industries (U.S.A.) Corp.

Opposition No. 102,216 to application Serial No. 74/674,081
filed on May 15, 1995

Joan L. Dillon, Bruce W. Baber and Curtis L. Doster of King &
Spalding for The Coca-Cola Company.

Brian Q. Young for Country Club Industries (U.S.A.) Corp.

Before Simms, Cissel and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Country Club Industries (U.S.A.) Corp. has filed an
application to register the mark "SPORT POWERACE" for "bottled
drinking water".¹

The Coca-Cola Company has opposed registration on the
ground that, since at least as early as 1989, it has adopted,
continuously used and federally registered the mark "POWERADE"

¹ Ser. No. 74/674,081, filed on May 15, 1995, which alleges a bona fide
intention to use the mark in commerce.

for "sports drinks and preparations and syrups for making the same";² and that applicant's mark, when used in connection with its goods, so resembles opposer's mark as to be likely to cause confusion, mistake or deception.

Applicant, in its answer, has admitted that opposer, since at least as early as 1989, has adopted, continuously used and is otherwise the owner of all rights, title and interest in the mark "POWERADE" as applied to sports drinks and the preparations and syrups for making the same; that opposer is the owner of the registration therefor as pleaded in the notice of opposition; that such registration is valid and in full force and effect; that opposer's goods are widely advertised and are distributed through numerous channels of trade including supermarkets, convenience stores, street vendors, and at international and local sports events; that opposer's "POWERADE" product is among the leading brands of sports drinks available in the United States; that opposer has made extensive sales of and has extensively promoted its goods, so that the mark "POWERADE" has come to be associated with opposer by the purchasing public; and that the parties' goods may be offered through the same, substantially the same or related channels of trade and would be sold to the same, substantially the same or related classes of purchasers. Applicant, however, has otherwise denied the salient allegations of the notice of opposition, including opposer's assertion that confusion is likely as to source or sponsorship of

² Reg. No. 1,832,856, issued on April 26, 1994, which sets forth dates of first use of October 16, 1989.

the parties' goods if such products are marketed under the respective marks.

The record includes the pleadings; the file of the opposed application; and, as part of opposer's case-in-chief, the testimony, with exhibits, of the senior brand manager of its "POWERADE" products, Gregory A. Watson. Opposer, as the rest of its case-in-chief, has submitted a notice of reliance upon (1) a certified copy of its pleaded registration, showing that the registration, as admitted by applicant, is subsisting and owned by opposer; (2) opposer's discovery deposition, and exhibits thereto, of applicant's president, Brian Q. Young; and (3) applicant's various responses to opposer's interrogatories and requests for production of documents.³ Applicant, however, did not take testimony, nor did it otherwise introduce any evidence in its behalf. Briefs have been filed, but an oral hearing was not requested.

Opposer's priority of use of its "POWERADE" mark is not in issue inasmuch as the certified copy of its registration for such mark shows, as admitted by applicant in its answer, that the registration is subsisting and owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). The record, in any event, establishes that

³ Although applicant has not interposed an objection thereto, it is pointed out that, under Trademark Rule 2.120(j)(3)(i), responses to requests for production of documents are not listed as constituting proper subject matter for a notice of reliance. Nevertheless, we have considered such responses, for the limited probative value thereof, as if stipulated into the record.

opposer is in fact the prior user of its "POWERADE" mark.⁴ The only real issue to be determined, therefore, is whether applicant's "SPORT POWERACE" mark, when used in connection with bottled drinking water, so resembles opposer's "POWERADE" mark for sports drinks and preparations and syrups for making such drinks that confusion is likely as to the origin or affiliation of the parties' respective goods.

According to the record, the goods sold and promoted by opposer under its "POWERADE" mark are known generically as isotonic beverages or, more commonly, sports drinks. The primary purpose or benefit of such a drink, as stated by opposer's witness, is that:

[I]t's a thirst quencher. It provides ... both a replenishment of ... natural fluids and minerals that you lose as you're exercising and also just generally quenches your thirst after ... any sort of physical activity.

(Watson dep. at 6.) Mr. Watson additionally noted, however, that "[w]ater would provide the same benefits". (Id.) In fact, according to Mr. Watson, bottled water and opposer's sports drinks, which are non-carbonated, "absolutely can be" considered substitutes for each other. (Id. at 9.)

Opposer sells its "POWERADE" products to consumers of all ages, although it considers the target market for its goods

⁴ Applicant, having failed to take testimony or otherwise present any evidence in its behalf, is limited to the May 15, 1995 filing date of its application as the earliest date on which it can rely in this proceeding. See, e.g., *Lone Star Manufacturing Co., Inc. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974) and *Columbia Steel Tank Co. v. Union Tank & Supply Co.*, 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960).

to be primarily those who range in age from eight to 18 years old. Its "POWERADE" sports drinks are currently available in six different varieties, which it calls "Lemon-Lime," "Fruit Punch," "Orange-Tangerine," "Tidal Burst" (a blend of sour fruit flavors), "Mountain Blast" (a blend of berry and other natural flavors) and "Jagged Ice" (a blend of blackberry and raspberry flavors). (Watson dep. Exs. 1A through 1F.) Such drinks are packaged ready-to-drink in 20, 24, 32 and 64 fluid ounce bottles and are also sold in a powdered form which, when mixed with water, constitutes a beverage.

Opposer, in addition to sales through vending machines, sells its "POWERADE" products in such channels of trade as supermarkets, convenience stores, petroleum outlets, mass merchandisers and club warehouse stores. Bottled water, according to Mr. Watson's testimony, is distributed in much the same way, being sold through trade channels which include supermarkets, convenience stores, petroleum outlets, mass merchandisers and club warehouse stores. In addition, Mr. Watson indicated that bottled water is typically "distributed ... through coolers at airports ... where our products could possibly be." (Watson dep. at 9.)

At the point of purchase in supermarkets, opposer's "POWERADE" sports beverage is typically sold in "the juice sports drink aisle," while "[i]n convenience and petroleum stores, it's generally in a cooler which would ... contain sports drinks ... [and] non[-]carbonated beverages such as juices and waters and ready-to-drink teas" (Id.) Opposer's sports drinks, like

water for drinking, are generally sold in the same kinds of packaging, consisting typically of bottles with push-pull caps.

Opposer advertises its "POWERADE" sports drinks in print ads as well as through the use of point-of-sale items such as pole signs, channel strips, banners, danglers, shelf talkers and barrel coolers. In addition, at sports events opposer gives away various promotional items bearing its "POWERADE" mark, including T-shirts, caps, squeeze bottles, coolers, cups and hats, to advertise and "develop the imagery of the brand". (Id. at 14.) Opposer's advertising of its "POWERADE" products has been continuous since the nationwide introduction of such brand, which to the best of Mr. Watson's knowledge occurred in March 1994. Annual advertising expenditures by opposer to promote its "POWERADE" sports drinks have ranged "anywhere from \$5 million to \$15 million" and have been increasing. (Id. at 15.)

Sales of opposer's "POWERADE" products in the United States have totaled "on average anywhere from \$130 million to \$170 million a year". (Id.) In the beverage field overall, sales of opposer's "POWERADE" sports drinks rank "within the top ... 20 brands" and such products are "the No. 2 brand in the sports drink category."⁵ (Id. at 16.) Currently, opposer is the only company in the sports drink field which incorporates the term "POWER" in a mark used for such products. Opposer's "POWERADE" brand has been the official sports drink of the

⁵ As of his May 19, 1997 deposition, Mr. Watson indicated that the sports drink market in the United States constituted an industry with a sales volume of about a billion dollars a year.

Olympic Games for the past four years and such status is expected to continue for the foreseeable future.

Opposer's "POWERADE" beverages compete with products outside of the category of sports drinks. In particular, opposer's goods primarily compete with such non-carbonated beverages as juices, ready-to drink teas, waters and fruit juices. In addition, the record indicates that opposer conducts appreciable promotional activities in connection with its "POWERADE" products on the West Coast since "areas like California and other markets out there are some of the stronger sports drink markets" (Id. at 19.)

Applicant, on the other hand, is a small, closely held California corporation which is engaged in the import-export business. Applicant was incorporated on January 1, 1992 and has its offices, and sole place of business, in Alhambra, California. Currently, applicant imports and exports only office supplies, such as pens and paper, from Southeast Asia, although it plans to export cellular telephones. While, at one time, applicant also exported wine, it has not done so since about 1994 or 1995. Thus, other than its intent to import and export bottled drinking water under its "SPORT POWERACE" mark, applicant presently is not otherwise involved in the beverage industry in any way.

Applicant does not currently manufacture any of the products which it sells, although it claims to have plans to do so with respect to bottled water, pens and combs. In particular, as to producing bottled water, applicant asserts that it is waiting for allowance of its involved application before

proceeding with any specific manufacturing plans. Presently, however, applicant does not have a warehouse facility; it does not have a source for the water for its "SPORT POWERACE" product; and it does not have any specific business plans, marketing strategies or channels of distribution for such a product.

According to Mr. Young, applicant does not know whether the bottled water which it intends to market under its "SPORT POWERACE" mark will be carbonated or not, although he expects that, unlike opposer's "POWERACE" sports drinks, applicant's product will not have flavors. Mr. Young further noted, however, that in the future, he "might consider" different flavors for applicant's "SPORT POWERACE" bottled water as well as adding sweetener to such product. (Young dep. at 35.) Moreover, while applicant, prior to selecting its mark, did not engage in any market studies, research or surveys and was not aware of opposer's "POWERADE" mark, applicant knew, before filing its involved application, that there is a sports drink industry in the United States and was familiar with the "GATORADE" brand of sports drink products. Applicant, at such time, had heard of opposer, but thought that opposer made just soft drink beverages. Applicant's first had actual knowledge of opposer's "POWERADE" mark when it received a copy of the notice of opposition in this matter from the Patent and Trademark Office.

Applicant intends to sell its "SPORT POWERACE" bottled drinking water to "the normal regular customer. The people." (Id. at 31.) As to whether such beverage would be a sports drink, Mr. Young testified as follows:

Q What was the idea behind the Sport Powerace name? In other words, were you anticipating it would be a sports drink to be marketed and sold to people engaged in sporting activities?

A Not just sport activity. For regular consumer.

Q Would it be straight water or would there be anything else in it?

A I believe straight water.

Q Similar to Crystal Geyser water or Evian water or something like that?

A Yes.

(Id. at 24.) Applicant intends to compete with other bottled beverages and anticipates selling its drinking water through both wholesale and retail channels of trade, including liquor stores and mass merchandisers such as K Mart and Target. Applicant, however, has not licensed or otherwise commenced use of its "SPORT POWERACE" mark.

As to the reason why applicant's mark contains the word "SPORT," Mr. Young testified as follows:

Q Let me ... clarify my question.
What's the effect of having sport here?
What does that have to do with the product?

A Sport is for somebody that ... do some of the sport [activities] and also people who are walking, or [do] work. So they ... all ... can drink this water. It's like energy.

(Id. at 40.) Mr. Young added that applicant's water will provide energy to consumers thereof because it "[p]robably" will be "spring water". (Id. at 41.) Furthermore, while conceding that the parties' respective goods are similar in that both constitute

water and share the word "POWER" in their marks, Mr. Young indicated that confusion as to source or sponsorship was not likely because, in addition to differences in the respective marks, opposer's "POWERADE" sports drink is essentially a soft drink, rather than "just water" like applicant's "SPORT POWERACE" product, and is sold chiefly to people who participate in sports activities, instead of to "the regular customer" as applicant's bottled drinking water will be. (Id. at 57-58.)

In terms of the volume of its import-export business, applicant had gross annual revenues of between \$30,000 and \$40,000 in 1994 and 1995, with net revenue of \$20,000 in 1995. Despite a net loss in 1996, applicant expects its gross annual revenue to be in the same range as that for the previous two years. Applicant advertises its import-export business only in the local Yellow Pages and has not done any advertising, press releases or other promotional activities with respect to introducing its "SPORT POWERACE" product into the marketplace.

Turning to the issue of likelihood of confusion, we find upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), that confusion as to source or affiliation is likely to occur. As a starting point, it is well settled that the issue of likelihood of confusion must be determined in light of the goods set forth in the opposed application and pleaded registration and, in the absence of any specific limitations therein, on the basis of all normal and usual channels of trade and methods of distribution for such goods. See, e.g., *CBS Inc.*

v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Here, applicant's goods are broadly identified in its application as "bottled drinking water," a description which encompasses not only plain or non-carbonated water but, like opposer's sports drinks, also includes flavored and/or sweetened water. The respective goods, in any event, can be considered as substitutes for each other in that both beverages provide the same benefits in terms of quenching thirst and replenishing fluids and minerals lost by the body during exercise or sports activities. Moreover, as admitted by applicant, the parties' goods may be offered through the same, substantially the same or related channels of trade, such as supermarkets, convenience stores, petroleum outlets, mass merchandisers, club warehouse stores, airport coolers and vending machines, and would be sold to the same, substantially the same or related classes of purchasers, including sports participants, athletes, teenagers and adults in general. Furthermore, both opposer's sports drinks and applicant's bottled drinking water would typically be sold, like juices, flavored water, ready-to-drink teas and other non-carbonated drinks, in the same aisles or cooler displays of retail beverage outlets and would be packaged in the same types of push-pull capped containers for convenient consumption. Clearly, if such closely related, fungible goods as sports drinks and bottled drinking water were to be sold under the same or

similar marks, confusion as to the origin or affiliation thereof would be likely to occur.

Applicant contends, however, that despite the fact that the respective marks contain the formative term "POWER," confusion is not likely because, principally in light of the presence of the word "SPORT" in its mark, the parties' marks are otherwise dissimilar in sound, appearance, connotation and commercial impression.⁶ We agree with opposer, however, that when the marks "POWERADE" and "SPORT POWERACE" are considered in their entirety, the marks are highly similar aurally, visually and connotatively and project substantially the same overall commercial impression. Specifically, as pointed out by opposer, the term "POWERACE" in applicant's mark differs from opposer's "POWERADE" mark by just a single letter, while the additional word "SPORT" in applicant's mark "is merely descriptive of the fact that its product is designed for use by persons who are 'do[ing] some of [the] sport'" or exercise activities and thus would utilize applicant's bottled drinking water as a kind of sports drink. Plainly, when respectively used in connection with bottled drinking water and sports drinks, which are products that

⁶ While differences are concededly apparent on the basis of a side-by-side comparison, such a comparison is not the proper test to be used in determining the issue of likelihood of confusion since it is not the ordinary manner in which consumers will be exposed to the marks. Rather, it is the similarity of the general overall commercial impression engendered by the marks which must determine, given the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks or service marks. See, e.g., *In re United Service Distributors, Inc.*, 229 USPQ 237, 239 (TTAB 1986); and *In re Solar Energy Corp.*, 217 USPQ 743, 745 (TTAB 1983).

typically are not bought with care since by their nature they are frequently replaced and often subject to impulse purchase, the marks "SPORTS POWERACE" and "POWERADE" are likely to cause confusion. Such would especially be the case inasmuch as opposer is the only company in the field of sports beverages which uses a mark incorporating the term "POWER".

Moreover, as a final, if not dispositive, factor, applicant has conceded in its brief that opposer's "POWERADE mark is a well-known mark"; that opposer's "POWERADE sports drink product is widely advertised nationally"; and that opposer's sales thereof "have been significant." Applicant, as noted previously, also admitted in its answer that opposer's goods are widely advertised and are distributed through numerous channels of trade; that opposer's "POWERADE" product is among the leading brands of sports drinks available in the United States; and that opposer has made extensive sales of and has extensively promoted its goods, so that the mark "POWERADE" has come to be associated with opposer by the purchasing public. In any event, the record establishes that opposer has continuously advertised its "POWERADE" products since their nationwide introduction in March 1994; that annual advertising expenditures to promote its "POWERADE" sports drinks have ranged in the neighborhood of \$5 million to \$15 million and have been increasing; that sales of such products in the United States have averaged from \$130 million to \$170 million a year in a marketplace with annual sales of around \$1 billion; that the "POWERADE" product has been the

official sports drink of the Olympic Games for the past four years; and that, in the beverage field, opposer's "POWERADE" sports drinks are one of the top 20 brands and are the second most popular brand in the sports drink category.

Consequently, even if opposer's "POWERADE" mark cannot be said to be famous generally, it has clearly become well known to consumers in the sports drink field and, as a strong mark, it is entitled to a correspondingly broad scope of protection from imitation. As emphasized by our principal reviewing court in *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), *cert. denied*, 113 S.Ct. 181 (1992):

The fifth *duPont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection.

In view of the renown of opposer's "POWERADE" mark for sports drinks, purchasers and prospective customers, particularly in the absence of any third-party uses of marks containing the term "POWER" in connection with beverages, could reasonably believe, upon encountering applicant's "SPORT POWERACE" mark on such a closely related, energy-enhancing substitute as bottled drinking water, that such goods constitute a new or expanded line of beverage products from the same source as opposer's "POWERADE" sports drinks. The widespread recognition of opposer's mark thus weighs decisively in its favor inasmuch as it serves to magnify the appreciable overall similarities in sound, appearance, connotation and commercial impression between such mark and

applicant's "SPORT POWERACE" mark. See Kenner Parker Toys Inc. v. Rose Art Industries Inc., supra at 1458.

We accordingly conclude that customers who are familiar with opposer's well known "POWERADE" mark for sports drinks would be likely to believe, upon encountering applicant's highly similar "SPORT POWERACE" mark in connection with bottled drinking water, that such closely related goods emanate from, or are otherwise sponsored by or affiliated with, the same source.

Decision: The opposition is sustained and registration to applicant is refused.

R. L. Simms

R. F. Cissel

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board